BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Applications For An Amendment Of Certificate For An Extension Of Territory And For an Original Water And Wastewater Certificate (for a utility in existence and charging for service)	)	Docket No. 992040-WS

INTERCOASTAL UTILITIES, INC.'S RESPONSE IN OPPOSITION TO DDI, INC. AND NOCATEE UTILITY CORPORATION'S JOINT MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO PRECLUDE RE-LITIGATION OF ISSUES

Intercoastal Utilities, Inc. ("Intercoastal"), by and through its undersigned attorneys and pursuant to Rule 28-106.204, Florida Administrative Code, files this response in opposition to that Motion filed by DDI, Inc. and Estuary Corporation (collectively "DDI") and Nocatee Utility Corporation ("Nocatee") to dismiss Intercoastal's application for water and wastewater certificates, or in the alternative, to preclude re-litigation of issues. The basis of the Joint Motion are the theories of *res judicata* and collateral estoppel, neither of which are applicable in the instant case.

The Joint Motion, stripped to its essence, essentially requests this Commission to determine that based upon a pattern of facts and circumstances, which are unknown to the Commission except for the fact that they are alleged by the applicant's opponents, Intercoastal does not have the right under Florida law to file its application. If Intercoastal's application is dismissed at this point, that is precisely the determination the Commission will be making. Additionally, the Joint Motion is not really a Motion to Dismiss. It is tantamount to the administrative equivalent of a

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Motion for Summary Judgment. Any suggestion that, at this point in the application process or in this newly established proceeding, there are "undisputed material facts" which would justify the summary dismissal of Intercoastal's application is contrary to the public interest and to Florida law.

At the outset, the law is clear that a Motion to Dismiss, such as the one filed by DDI and Nocatee is an inappropriate procedure to raise the defenses of *res judicata* and collateral estoppel. *Bess v. Eagle Capital, Inc.*, 704 So.2d 621(Fla. 4th DCA 1997). As the Court in *Swinney v. City of Tampa*, 707 So.2d 765 @ 766 (Fla. 4th DCA 1998) stated:

> . . . res judicata is an affirmative defense, pursuant to Florida Rule of Civil Procedure 1.110(d), and cannot be raised in a motion to dismiss unless the allegations of a prior pleading demonstrate its existence. See Fla. R.Civ.P. 1.140(b); *Byrd v. City of Niceville*, 541 So.2d 696 (Fla. 1st DCA 1989).

No prior pleadings filed in this docket disclose any factual basis upon which DDI and Nocatee could assert the defenses of *res judicata* or collateral estoppel. As the Court in *Swinney v. City of Tampa, supra*, further stated:

> Therefore, the trial court erred by considering an affirmative defense that does not appear on the face of the prior pleading. See *Temples v. Florida Indus. Constr. Co.*, 310 So.2d 326 (Fla. 2d DCA 1975).

This principle is equally applicable to a Motion to Dismiss based upon *res judicata* and collateral estoppel filed in an administrative proceeding. *University Hospital, Ltc. v. Agency for Health Care Administration,* 697 So.2d 909 (Fla. 1st DCA 1997).

It would be error for this Commission to address the issues of *res judicata* and collateral estoppel based upon the pleadings filed in this docket to date. As DDI and Nocatee acknowledge in a footnote, an evidentiary hearing must be held in order to determine whether the elements of *res judicata* and collateral estoppel are met. If DDI and Nocatee remain as parties to this proceeding, then they may raise these points in their prehearing statement for litigation at the final hearing.

A point which DDI and Nocatee gloss over for obvious reasons is that the essential element of both collateral estoppel and *res judicata* is that the issues be identical. *United States Fidelity & Guaranty Co. v. Odoms,* 444 So.2d 78 (Fla. 5th DCA 1984). The relief sought must also be the same. See *Daniel v. Department of Transportation*, 259 So.2d 771 (Fla. 1st Dca 1972), which, while also ruling that *res judicata* and collateral estoppel are not appropriate matters to be addressed in a Motion to Dismiss, includes an excellent analysis of *res judicata* and collateral estoppel, including the distinctions between them.

A review of the substantive facts leads to the clear conclusion that neither doctrine is applicable to this proceeding. It is particularly interesting that DDI would raise this issue in light of the position that they took in the proceeding before St. Johns County Water and Sewer Authority ("Authority"). In that proceeding, DDI complained that Intercoastal should not be allowed to extend its service area to serve its prospective development because the first phase of that development was located in Duval County and DDI did not want two separate providers of water and sewer service for its development. Now, those same parties conveniently argue that the St.

Johns' portion of Intercoastal's application should be summarily denied by this Commission. These two arguments, in and of themselves, reveal that Intercoastal's application before the Commission is not the same application Intercoastal pursued before St. Johns County. In actuality, this is only one of dozens of factual matters that differ between the instant application and the prior application of Intercoastal in St. Johns County which are unknown to the Commission at this point in time.

In fact, the Authority in its Preliminary Order (which was confirmed by the Board of County Commissioners) gave "great weight" to the specific fact (that Intercoastal's application did not include Nocatee's property in Duval County) in making its determination. See paragraph 9 of Preliminary Order attached to DDI's Motion. Now, because Intercoastal has taken action to alleviate that objection (or objective), DDI, Estuary and Nocatee claim that Intercoastal is forum shopping. Had Intercoastal known that DDI's development area was also in Duval County, it would have applied to this Commission instead of to St. Johns County. Intercoastal did not arbitrarily include land in Duval County for the sole purpose of coming within this Commission's jurisdiction. The property in Duval County is a part of the development which DDI proposes in St. Johns County. The Nocatee development, which encompasses a large tract of land in both St. Johns and Duval County, was not even known or announced at the time Intercoastal filed its application in St. Johns County.

It is axiomatic that in order for the issue litigated before the Authority to be identical, the applicable substantive law must be identical. *The Florida Bar v. Clement*, 662 So.2d 690 at 697 (Fla. 1995). That is clearly not the case in these proceedings.

In the prior case, St. Johns County was not operating under Chapter 367. In the prior case, St. Johns County was not operating under the Commission's Administrative Code Rules. In the prior case, St. Johns County was not operating under the Commission's precedents, case law and policies. In this case, the Commission will not be operating under the St. Johns County Ordinance applicable to the Authority. In this case, the Commission will not be operating under the rules, precedents and policies of the Authority or of the St. Johns County Board of County Commissioners. And perhaps most importantly, in this case, the Commission will not be wearing two hats – the hat of "judge" and the hat of "competition" to the applicant, as the Board of County Commissioners of St. Johns County did in the prior proceeding. Additionally, the Authority was advised by its counsel as follows:

- "Briefly, a word about the substantive rules that apply to this case. First of all, you look to your ordinance, and then to your rules to your interpretations. For example, you are not bound by Chapter 367. You're not bound by Public Service Commission interpretations of that statute. You, in effect, are writing on a clean slate insofar as your interpretations of this ordinance goes."

- "So, I don't want you to feel that your hide-bound by decisions that are made by an agency with a different statute. You're not. You clearly are not. You are free to make your own interpretations of your own ordinance."

At another point in the prior proceeding, this exchange occurred:

- Board Member Friedman: - "Whether it's Mr. Hartman or Mr. Cloud. Mr. Hartman mentioned that if this was before the PSC, there would be different rules and regulations. . ."

  . . .

  "So our rules, David, are different from the PSC's" -

Mr. Conn: "There are differences between the rules" -

. . .

Mr. Conn: "The requirements are more general of this Authority and less specific than the PSC."

These are only two examples of many, many discussions which occurred in that hearing in which all parties agreed that the Commission rules, statutes, policies and precedents had nothing to do with that proceeding.

Further, as noted by the Court in *University Hospital, Ltd., v. Agency for Health Care Administration, supra,* collateral estoppel does not apply where unanticipated subsequent events create a new legal situation, and *res judicata* cannot bar a subsequent application for a permit if the second application is supported by new facts, changed conditions or additional submissions by the applicant. These theories apply to the relitigation of an application before the same agency. Thus, even if the earlier application had been before this Commission, Intercoastal could have filed the instant application since these principles would apply. However, in the instant case, the application is before a different agency, applying different rules, policies and objectives and for a different "permit.".

The instant application differs from the one which Intercoastal filed with the Authority in its scope, in its projected costs, in its specific implementation of Intercoastal's plan of service, etc. The Commission is not even aware of all of the nuances of Intercoastal's present application at this point, so how could it compare the

issues which will be presented in this proceeding (which are not even framed as yet) with the issues which were involved in the prior proceeding?

Clearly, there is no identity in relief sought by Intercoastal in the St. Johns County proceeding and the instant proceeding. See *Brock v. Associates Finance, Inc.*, 625 So.2d 135 (Fla. 1st DCA 1993).

The territory which Intercoastal seeks an original certificate is uncertificated by either St. Johns County or this Commission, except that territory which has been certificated by St. Johns County to Intercoastal. Nocatee currently has an application pending before the Commission in Docket No. 990696-WS for the same territory requested by Intercoastal, and Intercoastal is a party to that proceeding in opposition to the application. Based upon the precedence established by this Commission in Order No. PSC-98-1089-PCO-WS, the instant proceeding should be consolidated with Docket No. 990696-WS for a final hearing on the competing applications.

WHEREFORE, Intercoastal requests this Commission enter an Order denying DDI, Estuary and Nocatee's Motion.

DATED this 31st day of January, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by the method indicated below to the following on this 31st day of January, 2000.

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